

NOS. 19-35743, 20-35269

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT DOUCETTE, et al.
Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.
Defendants-Appellees,

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON
No. 2:18-cv-00859-TSZ

MOTION TO TAKE JUDICIAL NOTICE

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I. MOTION

Pursuant to Federal Rule of Evidence 201, Plaintiffs-Appellants Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette (collectively, “Doucette”), move the Court to take judicial notice of one new email document, which confirms that Defendants-Appellees U.S. Department of the Interior, *et al.* (“Interior”) knew by June 18, 2018 of at least four inculpatory emails that the agency did not file with the District Court as ordered by February 21, 2019 or otherwise as required by 5 U.S.C. § 706. SER 31; Declaration of Gabriel S. Galanda in Support of Motion to Take Judicial Notice (December 14, 2020) (“Galanda Decl.”), Ex. A. Those four emails between Interior Counselor Kyle Scherer and the Nooksack holdover Council’s lobbyist, Robert Porter, reveal precisely how and why Interior issued the Recognition Decision on March 9, 2018. ER 0893-0899 (collectively, “Scherer-Porter Emails”). The new email confirms Interior’s knowledge of the Scherer-Porter Emails and undercuts the agency’s stated explanation for its failure to produce those decisional documents. Doucette first learned of the new email on May 29, 2020, when Interior produced the document pursuant to lead Plaintiff-Appellant Robert Doucette’s January 23, 2020, Freedom of Information Act (“FOIA”) request. Galanda Decl. at ¶ 2.

II. DISCUSSION

A. Document To Be Noticed And Its Relevance To This Appeal

Doucette argues in this appeal that Interior withheld the Scherer-Porter Emails because they showed the extent of Porter’s access and influence at Interior and reveal precisely how and why Interior issued the Recognition Decision on March 9, 2018—specifically, to advantage third-party RICO appellant-defendants as they appeared before this Court in related litigation that very day. Dkt. # BRIEF at _; ER 0097, 0108. Interior claims it was “harmless error . . . to omit these email messages from the administrative record.” Dkt. # 50 at 14-15. Interior suggests that Scherer’s transfer between Interior’s Office of Assistant Secretary—Indian Affairs (“ASIA”) and its Office of the Solicitor “could explain why these records were not found” or produced as part of the AR. *Id.* at 15. The new email reveals that Interior and Scherer knew of the Scherer-Porter Emails notwithstanding any personnel transfer, but concealed them from Doucette and the District Court. Galanda Decl., Ex. A.

B. Applicable Legal Standard

Federal Rule of Evidence 201 provides that the Court “may judicially notice a fact that is not subject to reasonable dispute because it: . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned,” and may do so “. . . at any stage of the proceeding.” Fed. R. Evid. 201(b), (d). This Court has taken judicial notice for the first time on appeal of facts developed after the appeal was filed, where those circumstances “may affect” the Court’s consideration of the issues presented on appeal. *See, e.g., Bryant v. Carleson*, 444

F.2d 353, 357 (9th Cir. 1971); *cf.* 21B Wright & Miller, *Fed. Prac. & Proc. Evid.* § 5110.1, at 301-02 (2d ed. 2005) (taking judicial notice of a fact outside the record “seems to be favored when the appellate court needs to take account of developments in the case subsequent to the proceedings in the trial court.”); Fed. R. Civ. Proc. 62.1.

Doucette seeks judicial notice of facts whose accuracy can readily be determined from their source and whose accuracy cannot reasonably be questioned. The single email document subject to this Motion is a record produced by Interior in response to Doucette’s FOIA request. The United States is a reliable source of accurate information related to their own records, and they possess the legal obligation to be accurate in response to FOIA requests. *See* 5 U.S.C. § 552. These facts were developed after Doucette filed his appeal on March 23, 2020 through no fault of Doucette, who filed his FOIA request on January 23, 2020 and did not receive a response until May 29, 2020. Galanda Decl. at ¶ 2. The information may affect the Court’s consideration of the issues on appeal because they bear on Interior’s failure to produce the whole AR as required by the Administrative Procedures Act (“APA”) and the District Court’s Order. 5 U.S.C. § 706; SER 31.

III. CONCLUSION

For the reasons above stated, Doucette respectfully requests that the Court exercise its discretion and take notice of the single email document identified herein. *See* Galanda Decl. Ex. A.

DATED this 14th day of December 2020.

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/s/ Anthony S. Broadman
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**DECLARATION OF GABRIEL S. GALANDA IN SUPPORT OF MOTION
TO TAKE JUDICIAL NOTICE**

I, Gabriel S. Galanda, declares as follows.

1. I am co-counsel of record for Plaintiffs-Appellants Robert Doucette, Bernadine Roberts, Saturnino Javier, and Tresea Doucette. I have personal knowledge of the matters set forth herein.
2. Attached as Exhibit A is a true and correct email document produced by the U.S. Department of the Interior on May 29, 2020, pursuant to lead

Plaintiff-Appellant Robert Doucette's January 23, 2020, Freedom of Information Act ("FOIA") request.

I declare under penalty of perjury pursuant to the laws of the United States and the State of Washington that the foregoing is true and correct.

SIGNED this 14th day of December 2020.

/s/ Gabriel S. Galanda
Gabriel S. Galanda, WSBA #30331
GALANDA BROADMAN PLLC

EXHIBIT A

Re: [EXTERNAL] FOIA Request | BIA-2018-01205 (Galanda, Gabriel)

Scherer, Kyle <Kyle.Scherer@sol.doi.gov>

Tue 6/19/2018 11:02 AM

To: Meacham, Kelly N <Kelly.Meacham@bia.gov>

Cc: LeaderCharge, Carol <Carol_LeaderCharge@ios.doi.gov>

I can provide you with what I have, based on the search suggestions you provided.

On Jun 19, 2018, at 10:52 AM, Meacham, Kelly <kelly.meacham@bia.gov> wrote:

Kyle,

I am not currently working in the FOIA Office. I'm assisting AS-IA (Immediate Office) with processing their FOIA requests. As I understand it, most Departments, and Bureaus within our Department for that matter, work in a similar way to Justice. However, our FOIA Office currently does not assist our program offices in that way. Do you feel the information I gave you, regarding the search, was sufficient?

Respectfully,

Kelly Meacham

U.S. Department of the Interior

Assistant Secretary - Indian Affairs

1849 C Street, NW

Washington, DC 20240

Direct: (202) 513-7707

E-mail: kelly.meacham@bia.gov

On Mon, Jun 18, 2018 at 1:23 PM, Meacham, Kelly <kelly.meacham@bia.gov> wrote:

Kyle,

As the request is written, the requester seeks only information received by, not sent from, AS-IA (Immediate Office). The date range would be September 1, 2017 - May 16, 2018. The keywords I would likely indicate would be "Nooksack" OR "election". Do you believe anyone else who worked in AS-IA (Immediate Office) during this time frame may have received communication that you did not regarding this?

Respectfully,

Kelly Meacham

U.S. Department of the Interior

Assistant Secretary - Indian Affairs

1849 C Street, NW

Washington, DC 20240

Direct: (202) 513-7707

E-mail: kelly.meacham@bia.gov

On Mon, Jun 18, 2018 at 12:31 PM, Scherer, Kyle <kyle.scherer@sol.doi.gov> wrote:

Yes please. I can search for "Nooksack" but I'm not sure that would catch everything that's responsive. When I was at Justice, we would receive from the FOIA team a list of searches they'd like us to complete so that we (the end user) aren't under-inclusive and determining ourselves what's responsive. This also allows for uniformity in response.

On Mon, Jun 18, 2018 at 11:55 AM, Meacham, Kelly <kelly.meacham@bia.gov> wrote:

Kyle,

Thanks for getting back with us. What do you mean by "search string"? We have a search form we fill out. Would you like the parameters we would ask for on that?

Respectfully,

Kelly Meacham

U.S. Department of the Interior
Assistant Secretary - Indian Affairs
1849 C Street, NW
Washington, DC 20240
Direct: (202) 513-7707
E-mail: kelly.meacham@bia.gov

On Mon, Jun 18, 2018 at 11:51 AM, Kyle Scherer <kyle.scherer@sol.doi.gov> wrote:

Thanks, Kelley. Can you please provide the search string you'd like us to use.

Sent from my iPhone

On Jun 18, 2018, at 10:30 AM, Meacham, Kelly <kelly.meacham@bia.gov> wrote:

Kyle,

Good morning.

I know it's only been a couple of work days since I sent my first email. I'd just like to get back with this requester regarding his recent inquiry as soon as I can. Do you know when you might be able to respond to the email I sent you a couple of days ago?

Respectfully,

Kelly Meacham

U.S. Department of the Interior
Assistant Secretary - Indian Affairs
1849 C Street, NW
Washington, DC 20240
Direct: (202) 513-7707

E-mail: kelly.meacham@bia.gov

On Thu, Jun 14, 2018 at 8:58 AM, Meacham, Kelly

<kelly.meacham@bia.gov> wrote:

Of course I forgot to attach the request. Here it is.

Respectfully,

Kelly Meacham

U.S. Department of the Interior
Assistant Secretary - Indian Affairs
1849 C Street, NW
Washington, DC 20240
Direct: (202) 513-7707
E-mail: kelly.meacham@bia.gov

On Wed, May 16, 2018 at 5:54 PM, LeaderCharge, Carol

<carol_leadercharge@ios.doi.gov> wrote:

Good afternoon Kyle and Miles

Can you please check your records for this FOIA attached and send me any responsive documents.

thank you

Carol Leader Charge
Special Assistant, AS-IA Office
desk: 202-208-7324
main: 202.208-7163
cell: (b) (6)

On Wed, May 16, 2018 at 3:28 PM, FOIA, BIA <foia@bia.gov>
wrote:

The forwarded FOIA request had been assigned control number BIA-2018-01205 (Galanda, Gabriel) in EFTS. The due date for determination is June 13, 2018. Please complete and return the coversheet upon completion of the FOIA life cycle. For inquiries please contact Heather Garcia, Acting, Government Information Specialist at Heather.Garcia@bia.gov and courtesy copy foia@bia.gov. Thank you!

P.S. Please send the acknowledgment to the requester.

----- Forwarded message -----

From: **Largo, Daniel** <daniel.largo@bia.gov>

Date: Wed, May 16, 2018 at 1:51 PM

Subject: Fwd: [EXTERNAL] FOIA Request

To: Gabe Galanda <gabe@galandabroadman.com>, "FOIA, BIA" <foia@bia.gov>

Cc: (b) (6), Jessica Rogers

<Jessica.Rogers@bia.gov>

Good morning, Gabe:
FYI, I am no longer the FOIA Officer for Indian Affairs, as a courtesy I have forward this to the FOIA Office. Ms. Jessica Rogers, who is copied on this email, is the new FOIA Officer for Indian Affairs.

Thank you,

Respectfully,

*Daniel Largo, Jr., Superintendent
Acting Superintendent for Spokane/Coeur D'Alene Agency
U.S. Department of the Interior
Bureau of Indian Affairs - Northwest Region
Northern Idaho Agency
[99 Agency Road](#)
P.O. Box 277
Lapwai, Idaho 83540
(Main) **208-621-4823** / Spokane Agency 509-258-4561
(Direct) **208-621-4831**
(Fax) 208-621-4803
E-mail: Daniel.Largo@bia.gov*

*****Please note new phone number*****




----- Forwarded message -----

From: **Gabe Galanda** <gabe@galandabroadman.com>
Date: Wed, May 16, 2018 at 8:45 AM
Subject: [EXTERNAL] FOIA Request
To: Daniel Largo <daniel.largo@bia.gov>
Cc: Michelle Roberts <(b) (6)>

Mr. Largo:

Please see, and kindly acknowledge receipt of, our attached FOIA request.

Thank you,

Gabriel S. Galanda 
Attorney at Law 
Galanda Broadman, PLLC
o: 206.557.7509
d: 206.300.7801 
gabe@galandabroadman.com

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